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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM Spartanburg
Court of General Sessions
Hon. Mark Hayes, Circuit Court Judge

Appellate Case No. 2022-000358
Lower Case № 2020GS4203001

State of South Carolina . . . . Respondent

vs.

Wesley R. Kyzer . . . . Appellant.

INITIAL REPLY BRIEF

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Argument

Question I

Did the trial court err in failing to grant a new trial when a juror failed to disclose that he was a stand out wide receiver for Coach Christopher Miller at Byrnes High School in 2007 and 2008 when Coach Miller was a witness for the State?

The testimony at the December 9, 2022 hearing established that the juror, Torian Richardson, played for Coach Chris Miller for three years. Dec. 9, 2022 hearing at 6, ll 12-15. Mr. Richardson played on three championship teams. Dec. 9, 2022 hearing at 13, ll 1-5.[1] Mr. Richardson may not have intentionally withheld the information in the sense he did so to harm or try to get on the jury. He withheld the information under the mistaken belief it did not apply to him. On this point he was wrong. The finding of the trial judge that he did not intentionally withhold the information does not end the enquiry.

The brief of the State appears to focus on the fact that Mr. Richardson did not consider himself a close personal friend of Coach Miller. Based upon the juror not considering himself a close personal friend, the State argues, makes the juror's answer factually correct. Factually correct should not be equated with legally correct. Mr. Richardson should have responded.

In *Smith v. State*, 375 S.C. 507, 654 S.E. 2d 523 (2007) abrogated on other grounds by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) the court found that the juror was not a close friend of the defendant. They only served a brief time in the detention center together.

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[1] The State's reference in its brief to Mr. Richardson playing for Coach Miller in 2007 and 2008 apparently come from the erroneous finding by the trial judge that Mr. Richardson played for Coach Richardson in 2007 and 2008. Based upon the trial testimony, this is obviously incorrect.

Unlike this case, the Court found, "At the PCR hearing, Juror Walling testified that he and Petitioner were not close friends. Petitioner corroborated Walling's testimony when he acknowledged that he did not know Walling very well." *Id.* 507, 519, 654 S.E.2d at 529. Thus, as both parties agreed they were not close friends, the answer was proper. The same cannot be said of a football coach and a former star player.

In *Robertson v. W. Union Tel. Co.*, 90 S.C. 425, ___, 73 S.E. 786, 788 (1912) a new trial was granted when the defendant after the trial learned that a juror was the uncle of the father of the plaintiff. The affidavit said, "That he sat at a juror and foreman of the same in the case of Mrs. Jerry Robertson against the Western Union Telegraph Company. That he is the uncle of the father of Mrs. Jerry Robertson. That at the time the circuit judge asked if any of the jurors were related to the plaintiff, deponent did not answer, because he did not know who Mrs. Robertson was at that time, and 'the same had no influence on me.'" In granting a new trial the Court stated, "Although the motion for a new trial, on the ground that the plaintiff and the foreman were related within the sixth degree, was addressed to the discretion of his honor, the presiding judge, nevertheless it was erroneously exercised, and the motion should have been granted." *Id.* at ___, 73 S.E. at 789. Just as the trial judge there abused his discretion in failing to grant a new trial, the trial judge in this case abused his discretion in failing to grant a new trial. Furthermore, the trial court in this case erred as a matter of law in failing to hold that a three-year star player for a witness Coach, is such a relationship that as a matter of law the relationship should be disclosed. In this case, if the relationship had been disclosed, Mr. Kyzer would have obviously used a strike. The trial court erred in failing to grant a new trial.

Question II

Did the trial court err in failing to direct a verdict for Mr. Kyzer based upon the fact that the state never proved that Robert Wesley Brown was a certified teacher at the school?

The State argues that they were not required to prove Robert Brown was a certified teacher. The law is very clear that to work in a classroom in a public school in South Carolina, one has to be a certified teacher. If the word "teacher" in the statute does not mean a "certified teacher," then what does the word "teacher" mean. The State has not answered this question.

If Coach Brown is employed as a teacher at Spartanburg High School, he is required to be certified. Even if the word "teacher" may not mean a certified teacher in a private school, the law requires that a person employed as a teacher in the public schools be certified. Simply put, if they are not certified, they are not a teacher in the public school system. If Coach Brown is not a teacher, Mr. Kyzer is not guilty of the crime charged. Contrary to the position of the State, Mr. Kyzer is arguing if the person in a public school is not certified, they cannot be employed as a teacher. The "civil" statute simply determines the status of a person employed by the public school board. Regardless of the duties Coach Brown performs, if he is not certified, he cannot be called a teacher in a public school.

Jeff Stevens, the superintendent for Spartanburg School District 7, admitted Coach Brown was not certified. Rec. on App. at 218, l 25 to 219, l 6. Russell Booker, who was the superintendent of Spartanburg School district 7 prior to Mr. Stevens, gave this testimony:

> Q. Okay, Was he also a teacher there Doctor Booker?
> A. Yeah, Coach Brown was the assistant strength coach or he is the assistant strength coach.

Q. And is that considered a teaching position?
A. It is considered a staff position.
Rec. on App. at 167, ll 1-5.

When the State has the burden of proving beyond a reasonable doubt that Coach Brown was a teacher, this testimony shows they have not met that burden. One superintendent considers Coach Brown a teacher and the other says he is a staff person. What one considers a person to be is not sufficient proof of the person being a teacher. Coach Brown must be a teacher at the public school for Mr. Kyzer to be convicted.

As noted in the opening brief, the legislature is presumed to know the law. The law as to certified teachers was passed before the law of threatening the life of a public official. The legislature is presumed to have known the definition of a teacher when it passed the law that indicted Mr. Kyzer. The legislature is presumed to have known the requirement that a teacher must be a certified teacher. "[W[here a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." *State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997); *See also* 73 Am. Jur. 2d Statutes § 110 (2023)("The legislature is presumed to know existing law at the time it enacts a statute."). To reach any other conclusion would mean that the determination of who is a teacher is left to the belief of the person bringing the charges. Would a person who home schools their children be considered a teacher? Would a person who tutors a student after school be considered a teacher? Such an expanded definition would render the statute unconstitutional. "This Court has held that where a statute is susceptible to more than one construction, the court should interpret the statute so as to avoid constitutional questions . . . ." *State v. Pittman*, 373 S.C. 527, 562, 647 S.E.2d 144, 162 (2007)(internal citations omitted).

Mr. Kyzer notes that the State has not briefed the issue raised in the opening brief that Rule 19 of the South Carolina Rules of Criminal Procedures requires the trial judge to direct a verdict if the State does not present sufficient evidence. As the trial judge under the rule is required to direct a verdict when the evidence is not sufficient to convict, this issue is preserved and the conviction should be reversed.

Question III

Did trial court err in failing to direct a verdict when the alleged threat did not arise out of the duties of Coach Robert Brown as a teacher as required by the statute?

The State, in arguing against this issue, has said, "[T]here is evidence that the threat arose out of Brown's responsibilities as a teacher. There was testimony Brown taught 30 classes a week, took attendance, put grades in, and lesson planned." Br. of Resp. at 11. The State fails, however, to show any evidence that the dispute between Mr. Kyzer and Coach Brown arose out of Coach Brown's teaching 30 classes a week, taking attendance, putting in grades or planning lessons. The incident in this case arose out of Coach Brown's duties as a coach and not as a teacher. As the incident did not arise out of Coach Brown's teaching duties, the trial judge should have directed a verdict.

In interpreting the phrase "arising out of" in the context of a worker's compensation case, our Supreme Court has said, "[T]he term 'arising out of' refers to the origin or the cause of the accident. An injury arises out of one's employment 'when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury.'" *Stone v. Traylor Bros., Inc.*, 360 S.C. 271, 275, 600 S.E.2d 551, 552 (Ct. App. 2004)(internal citations omitted). In the present case, as noted above, the origin or the cause of the dispute did not arise

out of the duties of Coach Brown as a teacher. They all arose out of his duties as a coach. In this case, no causal connection exists between the alleged teaching duties of Coach Brown and the basis for the disagreement between Mr. Kyzer and Coach Brown.

In arguing this issue, the State again has not argued against the position that Rule 19 requires the trial judge to direct a verdict. The plain meaning of the rule requires any trial judge to direct a verdict on their own motion when the evidence is not sufficient to convict. This issue was preserved. The trial judge erred in failing to direct a verdict on this issue.

Question IV

Did the trial court err in failing to sustain the hearsay objection which permitted Coach Robert Brown to give testimony as to the reputation of Wesley Kyzer which was prejudicial to Mr. Kyzer's case?

The State has argued that the hearsay statement attributed to Mr. Kyzer's son is admissible because it was not admitted for the truth of the matter asserted. The State claims, "The statement was not admitted for the truth of the matter asserted." Br. of Resp. at 12. This is simply not correct. If the state had wanted to establish the simple fact that Mr. Kyzer's son was kicked off the baseball team, all they needed to do is ask Coach Brown the simple question, "Was Mr. Kyzer's son kicked off the baseball team?" The obvious answer was "yes." The State could then have asked "Why?" The answer would have been that he cursed a coach and would not apologize. No need existed to go into what the son said. The State below never argued the statement was not admitted for the truth of the matter asserted. If this were the reason, at the trial, the State could have been required to stipulate that what the son said was not true. Had the State so stipulated, then there would have been no prejudice to Mr. Kyzer.

The problem with the State's position is that it is taking two contradictory positions. At the trial below, the State argued that the statement was admissible as an excited utterance. As such, the statement was admissible to prove the truthfulness of what was said. "Moreover, when a statement is admissible because it falls within a Rule 803 exception, it may be used substantively, that is, to prove the truth of the matter asserted." *State v. Ladner,* 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007). Now on appeal, the State argues the jury should not have considered the truthfulness of the statement. The alternative argument comes too late. The jury heard the statement and the jury was entitled to consider it for its truthfulness. To now say it is admissible because the jury is not entitled to consider its truthfulness simply come too late.

The hearsay statement was prejudicial to Wesley Kyzer. This Court should reverse the conviction and order a new trial.

CONCLUSION

For the reasons set forth Questions one and four, this Court should reverse the conviction of Wesley Kyzer remand for a new trial. For the reasons set forth in Questions two and three, this Court should reverse the conviction of Wesley Kyzer and dismiss the charges against him.

December 15th, 2023

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CERTIFICATE OF SERVICE

I, Sandy Traynham, hereby Certify that I am the Secretary for Attorney for the Appellant, C. Rauch Wise in the above entitled case. That on December 15, 2023, I did send via e-mail, a copy of the Initial Reply Brief of Appellant to Alan McCrory Wilson at agwilson@scag.gov ,Ambree Michele Muller, at the S.C. Attorney General's Office, ambreemuller@scag.gov , and Barry Joe Barnette at bbarnette@spartanburgcounty.org

December 15, 2023

/s/Sandy Traynham
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